SUPREME COURT, U. S.

FILED
APR 17 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1332

GEORGE ZARZOUR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM B. McCOLLOUGH, JR.
908 Frank Nelson Building
Birmingham, Alabama
Counsel for Petitioner

Of Counsel:
N. P. CALLAHAN, JR.
McCOLLOUGH & McCOLLOUGH
908 Frank Nelson Building
Birmingham, Alabama

R. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented—

Circumstances of Case 2

The Questions 3

Constitutional Provisions Involved 4

Statutory Provisions Involved 5

Statement of the Case 5

Reasons for Granting the Writ 9

Conclusion 18

Appendix "A"—Decision of the United States Court of Appeals, Fifth Circuit, August 23, 1967 ..... A1

Appendix "B"—Petition for Rehearing Denied, United States Court of Appeals, Fifth Circuit, March 19, 1968 A3

Table of Cases

Alexander v. *United States*, 5th Cir. 1965, 354 F. 2d 59 14

Alford v. *United States*, 282 U.S. 687, 692, 75 L. Ed. 624, 628, 51 S. Ct. 218 11

Boyd v. *United States*, 142 U.S. 450, 35 L. Ed. 1077, 12 S. Ct. 292 14

Chapman v. *California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 17-18

Douglas v. *Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 11

Einziger v. *United States*, 2nd Cir. 1921, 276 F. 905 15

Fahy v. *Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229 18

Gadsden v. *United States*, D. C. Cir. 1955, 223 F. 2d 627 16

Glasser v. *United States*, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 16
Hendrix v. *United States*, 5th Cir. 1964, 327 F. 2d 971 14
Lansdown v. *United States*, 5th Cir. 1965, 348 F. 2d 405 13
McMillian v. *United States*, 5th Cir. 1966, 363 F. 2d 165 13
Pointer v. *Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 11
Stovall v. *Denno*, 388 U.S. 293 12
United States v. *Harman*, 4th Cir. 1963, 323 F. 2d 650 15
United States v. *Wade*, 388 U.S. 218 18

Constitutional Provisions and Statutes

Constitution of the United States—
Sixth Amendment 3, 4, 8, 9, 10, 11, 16, 17
Federal Rules of Criminal Procedure—
Rule 7(c) 5, 8, 9
Rule 52(b) 5, 15, 18
Title 18, United States Code—
Section 2113(a) 2, 5
Title 28, United States Code—
Section 1254 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

GEORGE ZARZOUR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed petitioner's conviction in the United States District Court for the Northern District of Georgia.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit (382 F. 2d 1015, R. 242, Appendix A); the opinion and judgment of the United States Court of Appeals on rehearing (R. 340, Appendix B).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction was entered on August 23, 1967 (R. 242-243, Appendix A). On October 20, 1967, that Court entered an order (R. 252-253) granting petitioner's Supplemental Petition (R. 248-251). The opinion and judgment of the United States Court of Appeals for the Fifth Circuit denying petitioner's Petition for Rehearing was entered on March 19, 1968 (R. 340-341, Appendix B). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Circumstances of the Case

Petitioner was tried by a jury in the United States District Court for the Northern District of Georgia on an indictment (R. 224) charging him with bank robbery in violation of 18 United States Code, Section 2113(a). The jury found petitioner guilty, and petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit. On appeal, the only issue raised was the sufficiency of the evidence. On consideration of that issue, the Court of Appeals affirmed petitioner's conviction in an opinion entered on August 23, 1967 (R. 242-253, Appendix A). Thereafter, petitioner retained other counsel and requested special leave to file a petition for rehearing out

of time (R. 245-251). The Court of Appeals entered an order (R. 252-253) granting petitioner thirty (30) days in which to file a new brief. The matter was considered on briefs (R. 326) and the petition for rehearing was thereafter denied in an order entered on March 19, 1968 (R. 340-341, Appendix B)

The Questions

1. Does an indictment which alleges that a single defendant, in committing the offense charged, was aided and abetted by a named person, not charged as a co-defendant nor alleged to be a co-conspirator, adequately inform an accused of the nature of the accusation as guaranteed by the Sixth Amendment?

2. Was petitioner deprived of his Sixth Amendment right to confront and cross-examine witnesses against him in a trial which proceeded, in part, on a theory of guilt by association with a person whose photograph was identified as one of the bank robbers and who was killed prior to petitioner's trial while attempting to rob another bank in Mississippi?

3. Was petitioner denied a fair trial by the admission of testimony concerning an out of court identification of petitioner by two witnesses brought from Atlanta, Georgia, to Birmingham, Alabama, by FBI agents some eight months after the robbery occurred, for the purpose of identifying someone whose photograph they had previously identified as being that of one of the bank robbers?

4. Was the admission of hearsay testimony of an FBI agent concerning his examination of a car reported to him to have been stolen and used as the getaway car in the robbery with which petitioner was charged, in the absence of any testimony whatsoever connecting the car with

the robbery, plain error affecting substantial rights and requiring reversal of petitioner's conviction?

5. Was the admission of incompetent testimony by a Deputy Sheriff concerning the resemblance of the defendant to one of the persons appearing in a film taken during a bank robbery plain error requiring reversal?

6. Does the giving of an instruction having no applicability to the offense charged constitute plain error requiring reversal?

7. Was petitioner effectively deprived of his Sixth Amendment right to counsel by his trial counsel's absence from the courtroom during the District Attorney's closing argument to the jury and the Court's instructions to the jury?

8. Is something more than mere token representation required to satisfy the requirements of the Sixth Amendment's guarantee of assistance of counsel?

9. Has the Court of Appeals for the Fifth Circuit ignored the applicable decisions of the Supreme Court concerning the test to be applied in determining whether errors occurring during a trial constitute plain error requiring reversal under Rule 52 of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * * and to have the assistance of counsel for his defense."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure:

"Rule 7(c) Nature and Contents. The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

"Rule 52(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Title 18, United States Code, Section 2113:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank * * *

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

STATEMENT OF THE CASE

On October 30, 1964, at about 9:20 A.M., the Ponce de Leon Office of the Bank of Georgia, Atlanta, Georgia, was robbed by two armed men. On June 1, 1965, the grand jury returned an indictment (R. 224) charging that the petitioner, "* * * aided and abetted by Charles Alfred Sazera * * *," robbed said bank in violation of 18 United States Code 2113(a).

At trial, the first witness for the United States, Mr. W. J. B. Ball, Jr., testified as to the events in the bank during the robbery and identified petitioner as one of the perpetrators thereof (R. 39). He further testified to a prior out of court identification of petitioner (R. 41) on direct examination. The witness then identified a photograph (U. S. Exhibit No. 1) as being the other participant

in the robbery (R. 46). On cross-examination, the witness testified as to the circumstances surrounding the out of court identification (R. 49-57). His testimony was to the effect that he went to Birmingham with Special Agent Ponder of the FBI for the specific purpose of identifying or making an identification of petitioner (R. 51, 55).

Miss Ruth Lewis then took the stand and testified as to the events occurring during the robbery and identified petitioner as one of the perpetrators thereof (R. 67). She also testified as to a prior out of court identification of the petitioner (R. 67) and identified U. S. Exhibit No. 1 as being a photograph of the other participant in the robbery (R. 68-69).

The next witness, Roland May, testified to events during the robbery and identified U. S. Exhibit No. 1 as one of the participants therein (R. 74-78).

Mrs. Doris K. Lewis, the government's next witness, did the same (R. 80-86).

Mrs. Margaret Hamby testified to the events occurring during the robbery and purported to identify petitioner as one of the perpetrators thereof (R. 87-89). On cross-examination, this witness stated that her identification of appellant was based upon photographs shown her by Special Agent Ponder (R. 91).

The government's next witness, Mrs. Ross Tortorigi, identified U. S. Exhibit No. 1 as being a photograph of Charles Sazera (R. 95). The District Attorney then elicited, over objection, testimony that at some time prior to the offense charged, Charles Sazera had been paroled (R. 98).

The next two witnesses called by the government testified to the leasing of an apartment by the petitioner and the selection of furniture for the apartment by petitioner.

Miss Mary Bell Owens then testified that she sold to Ross Tortorigi (R. 116) furniture selected by petitioner (R. 119). The District Attorney then elicited from the witness, over objection, that "Charles somebody" had paid for the furniture (R. 120).

The government then called Mr. A. R. Braswell, a Deputy Sheriff of Jefferson County, Alabama, who testified that one of the persons appearing in the films of the bank robbery "looked a lot like" petitioner (R. 126).

Mr. Harry B. Perkins identified U. S. Exhibit No. 5 as a photostatic copy of an Application for Automobile Registration with the State of Georgia (R. 128-129).

Mr. William M. Hollingsworth then testified that a white 1964 Chevy II four-door sedan, which he had rented, had been stolen on October 29, 1964 (R. 131).

Special Agent Joseph P. Ayers took the stand and testified as to having examined an automobile reported to him as having been stolen and used as the getaway car in the robbery for which petitioner was being tried (R. 138-139).

The government then called Jess Lloyd Davis, a convicted felon, who testified about a conversation with petitioner, wherein petitioner admitted his complicity in the offense for which he was being tried (R. 144).

The film of the robbery was then shown to the jury (R. 151), after which the government rested.

Petitioner's case consisted mainly of testimony by his ex-wife that he had made an alimony payment to her in Birmingham, Alabama, on the date the offense charged was committed (R. 158).

After arguing his case to the jury, petitioner's trial counsel left the courtroom (R. 184) and remained absent

during the closing argument of the District Attorney (R. 194) and the Court's charge to the jury (R. 206).

The Court, in its instructions to the jury, gave an instruction concerning the meaning of the phrase "aided and abetted" (R. 198-199).

The jury returned a verdict of guilty (R. 216) and petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit. Petitioner's counsel at trial filed a four page brief wherein the only issue raised was the sufficiency of the evidence as to petitioner's identity. Petitioner's conviction was affirmed in an opinion entered on August 23, 1967 (Appendix A).

Petitioner then retained present counsel and petitioned the Court of Appeals for special leave to file a petition for rehearing (R. 245-251). Petitioner's request was granted in an order (R. 252-253) giving him thirty (30) days in which to file new briefs. The Court of Appeals took the matter under submission on briefs (R. 326) and, on March 19, 1968, entered an order (R. 340) denying the petition for rehearing (Appendix B).

REASONS FOR GRANTING THE WRIT

I

The Indictment Does Not Adequately Inform an Accused of the Nature of the Accusation As Guaranteed by the Sixth Amendment.

Among the basic rights guaranteed to an accused by the Sixth Amendment of the Constitution is the right to be informed of the nature and cause of the accusation against him. This constitutional right is implemented by Rule 7(c) of the Federal Rules of Criminal Procedure, 18 United States Code, which provides, in part, that an in-

dictment "* * * *shall* be a plain, concise and definite written statement of the essential facts constituting the offense charged."

An indictment which contains highly prejudicial, extraneous matter and allows the prosecution to proceed, in part, on a theory of guilt by association, does not conform to the clear mandate of the above quoted provision of Rule 7(c) and does not comply with the Sixth Amendment provision which guarantees to an accused the right to be *adequately* informed of the nature of the accusation against him. The indictment in this case charges, in substance, that petitioner robbed a bank and that he did so "aided and abetted" by Charles Alfred Sazera (R. 224). Sazera was not charged as a co-defendant, nor was he alleged to be a co-conspirator. Thus, the indictment charged the commission of a distinct offense by one other than the accused who was not a co-defendant nor a co-conspirator.

It is submitted that the Sixth Amendment requires that an indictment contain only those elements essential to charge an offense against the laws of the United States and no more. It is further submitted that the above quoted provision of Rule 7(c) is mandatory rather than merely directory and precludes the inclusion in an indictment of such highly prejudicial, extraneous matter as was alleged in this case.

The indictment was drafted in such manner as to allow the prosecution to proceed, in part, on a theory of guilt by association. Petitioner and his trial counsel were forced into the position of having to defend the petitioner's association with Sazera. The Sixth Amendment clearly forbids the practice thus pursued by the prosecution in this case.

Though there are many lower court decisions dealing with the sufficiency and adequacy of an indictment and the mode of attacking extraneous matter therein, there is no definitive authority as to the constitutional effect of the inclusion in an indictment of allegations such as are contained in the indictment in this case. It is submitted that the writ sought should be granted in order to determine whether or not the Sixth Amendment requires that an indictment must contain only those elements essential to stating an offense and precludes the inclusion of further extraneous matter therein.

II

Petitioner Was Deprived of His Sixth Amendment Right to Confront the Witnesses Against Him in a Trial Which Proceeded, in Part, on a Theory of Guilt by Association.

The effect of the language used in the indictment, supra, when considered in light of the testimony elicited concerning Sazera, was to make Sazera a prosecution witness. The record is replete with testimony concerning Sazera, who, though named in the indictment, was neither a co-defendant nor a co-conspirator. Four government witnesses identified U. S. Exhibit 1 as being a photograph of one of the participants in the robbery (R. 46, 68-69, 74-78, 80-86). One of the government witnesses then identified U. S. Exhibit 1 as being a photograph of Charles Sazera (R. 95). During the trial it was also brought to the attention of the jury that Sazera had a prior criminal record (R. 45, 98); that he paid for furniture purchased by petitioner (R. 120); and that Sazera was killed during the robbery of a bank in Mississippi (R. 26, 60).

The admission of such evidence was bound and intended to prejudice the jury and to lead them to the in-

ference that the petitioner was guilty of the offense charged because of his association with Sazera. There is no theory of law, nor are there any cases, which would justify the admission into evidence of testimony concerning Sazera to point the finger of suspicion at the petitioner. The use of such testimony could serve no possible purpose other than to impute guilt by association. Testimony concerning Sazera's participation in the offense charged, his prior criminal record, the commission of other offenses and his association with the petitioner made him in effect a prosecution witness without any opportunity for petitioner to confront and cross-examine such witness in court.

The Sixth Amendment guarantees to an accused the right to be confronted with the witnesses against him. This right has been recognized as "one of the safeguards essential to a fair trial." *Alford* v. *United States*, 282 U.S. 687, 692, 75 L. Ed. 624, 628, 51 S. Ct. 218; *Pointer* v. *Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065. The prosecution elicited testimony (R. 94, 101, 108, 114) for the sole purpose of establishing petitioner's association with Sazera. This association was referred to in the District Attorney's closing argument to the jury (R. 193, 195, 196).

This case cannot be characterized as one where the prejudice in the denial of the right of confrontation and cross-examination constitutes a mere minor lapse. *Douglas* v. *Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074. The prejudice arising out of the patent misconduct of the prosecution in this case constituted a deliberate encroachment and patent violation of the petitioner's Sixth Amendment rights. The writ should be granted in order that such practice as was pursued in this case be condemned as contrary to the traditional concepts of a fair trial and in clear violation of the mandate of the Sixth Amendment.

III

Petitioner Was Denied a Fair Trial by the Admission of Testimony Concerning an Out of Court Identification Such As Was Condemned by This Court in Stovall v. Denno, 388 U.S. 293.

During the trial of this case, the prosecution elicited testimony concerning an out of court identification of the petitioner by two of the eyewitnesses to the offense for which petitioner was being tried. This identification occurred in Birmingham, Alabama, some eight months after the commission of the robbery (R. 41). The circumstances of the out of court identification were unquestionably suggestive (R. 40-41, 51, 55). One of the witnesses testified (R. 51) that he and the others had accompanied an FBI agent to Birmingham for the specific purpose of making an identification of someone whose photograph they had previously identified as one of the participants of the robbery.

The decision of this Court in *Stovall* v. *Denno*, supra, condemned pre-trial out of court identifications when they are conducted in such a manner as to be so inherently prejudicial as to constitute a denial of due process. Petitioner submits that the identification of petitioner under the circumstances as set forth is so inherently prejudicial as to constitute a denial of due process and necessitate a reversal of the petitioner's conviction. The writ should be granted in order to further define the circumstances under which such out of court identifications may be used at trial.

IV

The Admission of Hearsay Testimony Concerning the Examination by an FBI Agent of a Stolen Car Allegedly Used As the Get Away Car in the Robbery for Which Petitioner Was Being Tried Constituted Plain Error Affecting Substantial Rights and Requires Reversal.

During petitioner's trial, an FBI agent took the stand and testified (R. 137-138) concerning his examination of an automobile reported to him as having been stolen and used as the get away car in the robbery. In *Lansdown* v. *United States*, 5th Cir. 1965, 348 F. 2d 405, the admission of similar testimony was condemned as plain error affecting substantial rights and requiring reversal. This was recognized and reaffirmed in the case of *McMillian* v. *United States*, 5th Cir. 1966, 363 F. 2d 165. There was no testimony during petitioner's trial that the automobile examined by the FBI agent, and concerning which he testified, was used as the get away car in the commission of the offense for which petitioner was convicted. The error was aggravated to such an extent as to require reversal by the comment of the District Attorney in his closing argument to the jury concerning petitioner's whereabouts on the day that the automobile was stolen (R. 193).

The Fifth Circuit in its order denying rehearing ignored its prior decisions on the same matter and thus sanctioned such a departure from the usual and accepted course of judicial proceedings by the trial court as to call for an exercise of this Court's power of supervision.

V

The Admission of Testimony by a Deputy Sheriff Concerning the Petitioner's Resemblance to One of the Persons Appearing in a Film Taken During the Commission of the Bank Robbery for Which Petitioner Was Being Tried Constitutes Plain Error.

After having identified himself as a detective with the Jefferson County, Alabama, Sheriff's office (R. 124), one of the government's witnesses testified that he had been shown films of the bank robbery (R. 125) and that one of the persons appearing in the films "looked a lot like" petitioner (R. 125). Such testimony is plainly incompetent to establish the identity of petitioner as one of the participants of the bank robbery. The Court of Appeals for the Fifth Circuit has held that identity must be based upon something more than resemblance. *Hendrix* v. *United States,* 5th Cir. 1964, 327 F. 2d 971; *Alexander* v. *United States,* 5th Cir. 1965, 354 F. 2d 59.

The prejudice was compounded by an unresponsive answer to a question by defense counsel wherein the witness testified that he first viewed the film soon after a bank robbery in Birmingham (R. 126). The natural inference to be drawn from such testimony was that petitioner was involved in the bank robbery in Birmingham.

It is a fundamental rule of criminal law, that absent a requirement of showing system or intent, evidence of offenses other than that charged in the indictment is not only inadmissible, but prejudicial if admitted. *Boyd* v. *United States,* 142 U.S. 450, 35 L. Ed. 1077, 12 S. Ct. 292.

Here also the Court of Appeals for the Fifth Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings and the writ should be granted to correct the effect of that Court's opinion.

VI

The Giving of an Instruction, Though Correct, Having No Applicability to the Offense Charged, Constitutes Plain Error.

The Court, in its charge to the jury, gave an instruction concerning the meaning of the phrase "aided and abetted" (R. 198-199). It has long been recognized that instructions which would tend to authorize a conviction if the evidence established a violation of the law, though not charged in the indictment, are prejudicial error within the purview of Rule 52(b). *Einziger* v. *United States*, 2nd Cir. 1921, 276 Fed. 905. In *United States* v. *Harman*, 4th Cir. 1963, 323 F. 2d 650, it was also held that the giving of an inapplicable instruction required reversal under Rule 52(b).

An instruction concerning the phrase "aided and abetted" had no applicability to the guilt or innocence of petitioner. The giving of such an instruction merely compounded the error resulting from the admission into evidence of a mass of irrelevant testimony concerning Charles Sazera, who was alleged, in the indictment, to have "aided and abetted" the petitioner in the commission of the offense charged.

The Court of Appeals for the Fifth Circuit in its opinion denying rehearing found the charge of the trial court to be fair and correct. It is submitted that, in thus finding, the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of the Courts of Appeals for the Second and Fourth Circuits on the same matter.

VII

Petitioner's Sixth Amendment Right to Counsel Was Abridged by His Trial Counsel's Absence from the Courtroom During the District Attorney's Closing Argument to the Jury and the Court's Instructions to the Jury.

At the conclusion of his argument to the jury, trial counsel for petitioner left the courtroom (R. 184), remained absent during the District Attorney's argument to the jury (R. 196), and did not return until after the Court had concluded its instructions to the jury (R. 206).

The Sixth Amendment guarantees to an accused the right to have assistance of counsel at every stage of the proceedings against him. This right is one of substance and is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty. *Glasser* v *United States*, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457. The Court of Appeals for the Fifth Circuit in its opinion denying rehearing (R. 340, Appendix B) ignored this abridgement of fundamental rights which occurred during petitioner's trial. The Court apparently felt that the presence of other counsel in the courtroom during the critical stages of the proceedings, during which petitioner's counsel was absent from the courtroom, was sufficient compliance with the mandates of the Sixth Amendment as to cure any prejudice to petitioner.

The right guaranteed by the Sixth Amendment has been construed to give an accused the right to counsel of his own choice. It has been held by the Court of Appeals for the District of Columbia that if trial counsel is replaced by substitute counsel at any stage of the proceedings, the trial judge has the affirmative duty to ascertain whether substitute counsel is qualified and adequately prepared to give effective representation. *Gadsden* v. *United States*, D. C. Cir. 1955, 223 F. 2d 627.

The writ should be granted in order that this Court may determine the circumstances under which the Sixth Amendment requirements concerning the assistance of counsel are deemed to have been complied with by the presence of substitute counsel and in order to clarify the conflict between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the District of Columbia on this same matter.

VIII

Something More Than Mere Token Representation Is Required to Satisfy the Sixth Amendment Guarantee of Assistance of Counsel.

The right to the assistance of counsel guaranteed by the Sixth Amendment has been interpreted to mean "effective assistance of counsel." While admitting that petitioner is not entitled to errorless, infallible or perfect representation, it is most seriously insisted that an accused is entitled to more than mere token representation and that, when such is lacking, it becomes the duty of the court to take steps to adequately protect a defendant from prejudice and to insure that he has a fair trial. Because of the lack of a definitive standard by which the effectiveness of counsel may be tested for purposes of determining compliance with the Sixth Amendment, the writ should be granted.

IX

The Court of Appeals for the Fifth Circuit Has Ignored the Test Prescribed by the Supreme Court for Determining Whether Errors Occurring During Trial Constitute Plain Error Requiring Reversal under Rule 52 of the Federal Rules of Criminal Procedure.

Before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman* v. *Cali-*

fornia, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824. This statement was made in an opinion clarifying the test to be applied in determining plain error under Rule 52(b) of the Federal Rules of Criminal Procedure wherein the Court stated that "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229. In Chapman, it was further stated that an error in admitting plainly relevant evidence which possibly influenced the jury cannot be considered harmless.

Petitioner's guilt was sought to be established by (1) his identity by eyewitnesses as one of the perpetrators of the offense charged, and (2) his association with Charles Sazera who was identified as the other participant in the offense charged. The prejudice arising from the errors complained of by petitioner and the erroneous admission of evidence on the theory of guilt by association is further aggravated by the inherent weakness in the eyewitness testimony relied upon by the government. See *United States* v. *Wade*, 388 U.S. 218.

The Court of Appeals for the Fifth Circuit found petitioner's contentions as to the presence in the record of plain error requiring reversal to be without merit.

In doing so, the Court of Appeals for the Fifth Circuit ignored applicable decisions of this Court concerning the test to be applied when the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure are invoked.

CONCLUSION

It is earnestly insisted that the opinion of the Court of Appeals for the Fifth Circuit denying petitioner's petition for rehearing has sanctioned such a departure from

the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is further submitted that petitioner's trial was conducted in such a manner as to substantially deviate from the traditional concepts of due process to such an extent as to require reversal by this Court in the exercise of its supervisory powers.

WILLIAM B. McCOLLOUGH, JR.
910 Frank Nelson Building
Birmingham, Alabama
Counsel for Petitioner